JUDGEMENT IN LAW AND POLITICS

FALL 2007

Professor Jennifer Nedelsky

Faculty of Law
University of Toronto

JUDGEMENT SEMINAR

POL 2023; LAW 372H1S

FALL 2007

PROFESSOR NEDELSKY

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This course explores the nature of the human faculty of judgement. We will be looking at the connections and differences between the judgements we make every day (is it a good course, book, movie) and moral, political and legal judgements.

There are two different kinds of problems our exploration will try to address. The first arises out of feminist theory, critical legal theory and a variety of other contemporary approaches to law. In all of these approaches that has been an emphasis on the importance of recognizing the multiplicity of different "voices" in our diverse society. Our legal system, like all of our institutions, has presupposed an unitary framework of discourse to which all who want to participate must conform. The call to recognize difference and make it possible to everyone's voice to be heard is a positive move. But it poses problems that are still to be worked out. A judge can adjudicate between two sides of a story when the story has a recognizable unity, that is when both sides have fit into a common framework. But if we no longer try to force diverse perspectives into the dominant framework, judges will be faces with truly incommensurable stories. (This already sometimes happens in cases of rape, sexual harassment and "hate speech.") How are we to judge between them? A related question arise with respect to the conventional virtues of judicial judgment: neutrality, impartiality, objectivity. What becomes of these virtues, how do we need to reconceptualize them, when we recognize the role of passion in knowledge and the inevitability of perspective in understanding? A large part of the project of the course is to see the ways philosophical writings on the nature of judgement may be able to help us solve these pressing problems. Two of the common themes that link the philosophical and contemporary legal arguments are the role of story telling or narrative and the role of common sense in judgement.

The second problem is a long standing one: is there something distinctive about the legal form of judgement that justifies (or requires) the institutional forms we have developed for judicial decision making. This problem involves not only the "undemocratic" nature of courts, but the particular norms of discourse that we think of as "legal." If we have a better understanding of what judging consists of, and what foster good judgement, then we can do a better job of thinking about the appropriate institutions, norms and practices of law. Since many of the readings address themselves to the question of political and moral judgement, we will have to ask whether there is reason to believe that legal or judicial judgement involves something different.

COURSE REQUIREMENTS: Class participation and bi-weekly one page "comments" (25%) . Comments are due Sunday before class, responses by noon Monday

and a 25 page paper (75%) (last date for written work, **NOON**, law students 10:00 AM).
The paper will focus on 3 or 4 of the readings, connecting them to each other and to the main themes of the course. Students should show how together they contribute to these themes, or develop a particular problem related to these themes, and use the articles to work the problem through, or show how the insights of these articles help us better understand a particular concrete case or problem. If you are using an example not drawn from the course material, be sure you do not spend too much space presenting the example. A maximum of 2-3 pages. If you find you cannot present the example you have in mind within that space, you may use additional pages. But then you will need to add those additional pages to the total length of the paper, so that you still have at least 22 pages of analysis, integrating the example into your discussion of the texts and the key issues. A similar approach applies to using material outside the assigned reading. You are, of course, welcome to note other material that adds to your argument. But if you spending more than a few lines referring to that material, you should ensure that you still have the required page length devoted to the analysis of the texts and issues in the course.
Papers must be submitted to turnitin.com

BY THE LAST CLASS, STUDENTS SHOULD SUBMIT A PARAGRAPH SUMMARY OF THEIR PAPER TOPIC AND THE TEXTS THEY WILL FOCUS ON, OR AN OUTLINE OF THE PAPER WHICH IDENTIFIES THE TEXTS. STUDENTS MAY SUBMIT THIS SUMMARY OR OUTLINE EARLIER, BUT I RECOMMEND THAT IF YOU DO SO YOU AT LEAST SKIM ALL THE MATERIALS SO YOU WILL KNOW WHICH WILL WORK BEST FOR YOUR TOPIC.

REQUIRED READING: Materials to be purchased through the Law School Bookstore and Judgment, Imagination and Politics, Ronald Beiner and Jennifer Nedelsky, eds. Available at the Toronto Women's Bookstore, Harbord Street just west of Spadina.

Week 1.	Hannah Arendt, "The Crisis in Culture" Part II, (Part I optional) from Between Past and Future, in Beiner and Nedelsky, Judgment, Imagination and Politics, noted as **JIP**; Nedelsky, SSHRC Proposal **(M)**; R.D.S. case, SCC September 26, 1997 **(M)**. Come to class with an example of a problem of judgement and thoughts on how these preliminary readings help us reflect on it. Group 1, comment; Group 2, respond
Week 2.	Beiner, Ch. 4, 5, 6 (Ch.3 optional) (**M**) Group 2 comment, group 3 respond.
Week 3.	Arendt, Lectures, pp. vii – p. 51; Kant, Critique of Judgment, s 6-8, Werner Pluhar, translator (Hacekett,1987). (**M**) Group 3 comment, group 4 respond.
Week 4.	Arendt, Lectures, p. 51-85, (**M**) Bilsky, When Actor and Spectator Meet in the Courtroom: Reflections on Hannah Arendt's Concept of Judgment" **JIP** Group 4 comment, group 1 respond.

Week 5. Beiner, "Rereading Hannah Arendt's Kant Lectures"; Nedelsky, "Judgment, Diversity and Relational Autonomy" **JIP**; Kant, Critique of Judgment, ss 31-42
Group 1 comment, group 2 respond. **ATTENTION: HEAVY READING, START EARLY**

Week 6. Seyla Benhabib, "Judgment and the Moral Foundations of Politics in Hannah Arendt's Thought," Iris Marion Young, "Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought," **JIP**
Group 2 comment, group 3 respond

Week 7. Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* (Chicago, 2001), pp. xi-xvii, 295-357
Group 3 comment, group 4 respond

Week 8. Nedelsky, "Embodied Diversity: Challenges to Law," 42 McGill Law Journal 91 (1997) **JIP;** Graham Mayeda, "Uncommonly Common: The Nature of Common Law Judgment," XIX The Canadian Journal of Law and Jursiprudence 107 (2006) **M**
Group 4 comment, group 1 respond

Week 9 Kim Lane Scheppele, "Just the Facts, Ma'am: Considering Considered Stories," . Nedelsky, "Communities of Judgment." **M**
Group 1 comment, group 2 respond

Week 10. Onora O'Neill, Constructions of Reason: Explorations of Kant's Practical Philosophy, ch. 9, "The Power of Example" (Cambridge University Press, 1990) and Barbara Herman, "The Practice of Moral Judgment," The Journal of Philosophy, (1985) **M**
Group 2 comment, group 3 respond

Week 11. Albrecht Wellmer, "Hannah Arendt on Judgment: The Unwritten Doctrine of Reason" **JIP**
Group 3 comment, group 4 respond

Closing reflections: Group 4, group 1 respond.

JUDGEMENT COURSE MATERIALS

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Section 2: Description of Proposed Research

Name of principal investigator
Jennifer Nedelsky

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rule of law -- without returning to the question of what the rule of law is to be without this form of impartiality. Other theorists suggest that we ought not focus our attention on adjudication. In the context of a proposal for a new conception of objectivity, Sandra Harding (1990) was asked what to do when faced with incommensurable stories and corresponding arguments for policy, such as the conflicting views among women about new reproductive technologies and contractual pregnancy (so called "surrogate motherhood"). She responded that we should try to understand the sources of the competing perspectives; the preoccupation with judging between them is a concern of those in power. But, in fact we are all called upon to make judgements between competing perspectives, and we need to know how to do so wisely and fairly. And, of course, law as we know it requires such judgements routinely. If we are to replace traditional notions of objectivity, we need to know what the alternative ideal would be for judgement. Finally, there are several fine theorists at work on various forms of the project of reconceptualizing the practice of judging (e.g., Minow, 1990; Minow and Spelman, 1988; Resnick, 1988) But there has been no systematic use of the philosophical literature on judgement to which I refer.

Narrative has emerged as a powerful and contested form of legal scholarship (Scheppele, 1989; Abrams, 1991). But there has been relatively little theoretical exploration of just what it is that narrative contributes and how it challenges our understanding of the kind of knowledge -- or mental processes -- appropriate to legal judgement (Abrams, 1991). The only thing that is really clear is that the use of narrative makes tacit and explicit claims about the appropriate role of emotion in judgement -- claims challenging the conventional meaning of disinterest, impartiality and objectivity. Here I will link these issues to the feminist theory that challenges the conventional split between reason and emotion. My most important purpose, however, is to frame the emergence of narrative in a way that will reveal how well it fits into both the Arendtian and Aristotelian conceptions of the role of storytelling in judgement.

My objective in discussing incommensurable stories is both to show how many currently divisive issues are best understood in these terms and to show that once we acknowledge the routine existence of incommensurable stories, the theoretical problems for judgement are formidable.

The issue of exclusionary groups for those who have been disadvantaged is, of course, a subject of ongoing debate on university campuses (often around membership rules for women's centres). My purpose here is to articulate the claims for their transformative power, in order to show that the conception of judgement grounded in community offers a new and compelling framework for understanding those claims. This explanation will also contribute to a broader theoretical debate generated by theories of the social construction of reality. These theories hold out the promise of the infinite malleability of the world through language, but often provide little sense of how it is that we can ever move beyond the conceptual frameworks in which we are inevitably enmeshed (e.g., Peller, 1985). Consciousness-raising groups

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offer a model of how a shift in the community in which one articulates, perceives, and judges the world makes possible a shift in the content of those formulations, perceptions, and judgements (MacKinnon, 1982). But the literature has been lacking in a fully adequate account of why that should work. By framing the question in this way, we will be able to see how the role of community in judgement can provide that account. The result (by the end of the project) will be a solution to an important theoretical problem (which goes beyond the concerns of feminism) and a new form of reasoned justification for a contentious political practice.

PART II. In the second part of the project, I will begin with the striking fact that conceptions of judgement that differ in important ways, such as Kant's and Aristotle's, share a primary role for storytelling and community. I will begin with Arendt's conception of judgement, as she develops it out of her treatment of Kant. I will then look at the divergent understandings of community underlying Aristotle's concept of phronesis and Kant's concept of judgement. This exploration will begin with Beiner's Political Judgement, and include a discussion of Gadamer and Habermas. The focus, and the contribution to this literature, will be provided by the project of generating a theoretical framework for the problems outlined above. In the process of constructing this framework from these diverse theories of judgement, I will provide a clearer picture of the limits of these approaches and thus the areas that require further development in order to provide a new foundation for the practice of judging (see PART III).

Part II will also focus on the ways in which a conception of judgement that is distinct from the apprehension of the truth or deductive reason is much more hospitable to the contemporary challenges to neutrality, impartiality, and objectivity than the conventional ideal of judicial decision-making. In this section I will also look at Martha Nussbaum's use of Aristotle for her development of conceptions of knowledge different from the prevailing "scientific" and economistic models (1990). I will link her work to Arendt's argument (drawing on Kant) that matters of taste -- and questions of judgement -- are inevitably subjective, but are not mere arbitrary preferences: "Taste judgements, furthermore, are currently held to be arbitrary because they do not compel in the sense in which demonstrable facts or truth proved by argument compel agreement. They share with political opinions that they are persuasive; the judging person ... can only 'woo the consent of everyone else' in the hope of coming to an agreement with him eventually" (Arendt, 1963, p.222). Judgement appeals to "common sense" because it seeks this agreement, and claims that, in principle, it can be achieved. Both Nussbaum and Arendt (in quite different ways) are making the crucial argument that in spheres where claims to (absolute, objective) truth are inappropriate, we have a human capacity for seeking agreement that is something quite different from the aggregation of preferences. The contemporary challenges to the judicial ideals of objectivity and impartiality require just such a framework within which to proceed.

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PART III. These theories of judgment help construct a framework, but they do not provide all the answers. The two problems I will focus on in this section are impartiality and incommensurable stories. There are differences between the philosophical approaches noted above in the vision of how the starting point of individual subjectivity is transformed or transcended. In particular, there are differences between the Kantian and Aristotelian conceptions of how the appeal to common sense or the shared community of values is to take place. The problem in our contemporary world is how to form judgements when part of the decision seems to be a choice among competing communities of values and when there are important spheres in which there seems to be no shared common sense. Narrative may turn out to provide a path for communication across as well as within communities of value, and contemporary feminist treatments of Habermasian communicative ethics may also help (Benhabib, 1987). Working out this problem is essential for a conception of judgement that can work in the legal sphere.

PART IV. This section will address the unspoken problem underlying all the arguments above: is there something distinctive about legal judgement? I have been deliberately drawing on arguments about <u>political</u> judgement (particularly in the case of Beiner and Arendt), arguments intended, in part, to distinguish themselves from legal judgement. While I recognize and appreciate the importance of articulating the role of judgement in politics, I want to proceed from there to argue that the key dimensions of the conception of political judgement <u>do</u> apply to legal judgement. This argument will require going beyond, and perhaps in opposition to, the views of Arendt and Kant. For example, Arendt says, "the chief difficulty in judgment is that it is 'the faculty of thinking the particular' [citing Kant, <u>Critique of Judgment</u>, Introduction, section IV]; but to <u>think</u> means to generalize, hence it is the faculty of mysteriously combining the particular and the general. This is relatively easy if the general is given --as a rule, a principle, a law -- so that the judgment merely subsumes the particular under it." (1983, p.76) But this is far too casual a description of what is entailed in deciding a legal case -- especially in a common law system. Case law seems to entail just this mysterious process of combining the general and the particular. Certainly in some instances legal judgement is an example of her next claim: "The difficulty becomes great 'if only the particular be given for which the general has to be found.'" (Ibid.) My project will require me to address the question of why Kant did not treat law as a matter of judgement. But that will not be my central concern. My task is not simply to apply existing conceptions of judgment, but to develop a better understanding of legal judgement.

My basic starting point will be that the conventional grounds for differentiating legal from political judgement are unpersuasive. For example, Beiner says that "Aristotle differentiates political judgement from legal judgement by reference to time, defining the former as future-oriented." (p.90). But it is precisely part of the complexity of judicial decision making that it must judge actions in the past not only in light of assessments of norms shared in the past (at the time

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of the action) and the present (at the time of the decision), but also in light of deliberations about what norms should prevail in the future. There are always tensions here, but it is deceptively simple to say that legal judgement need not be future oriented.

Of course, the deeper question here is the old one of whether there is a distinction between law and politics. For my purposes here, I will recast that as whether there is something distinctive about the kind of judgement called for in adjudication -- something which makes the insights of the literature I have been calling upon inappropriate. I will argue that the answer is no, but look for particular areas that might require revision.

Finally, I will use as examples interviews with five to ten judges and policy makers who have had to make judgements in the face of sharply divergent perspectives (such as those in sexual harassment cases and the academic freedom vs. hostile learning environment debate).

PART V. The conclusion will articulate the conception of judgement that emerges from the effort to use it to address the four initial problems. This final section will also connect this conception of judgement to the broader project of an alternative ideal of legality (e.g., Michelman, 1987; Minow, 1990; Levinson, 1988, Radin, 1988). In particular, I will connect it to my own earlier work on relationship as the basic framework for legal analysis. I will argue that new visions of rights (as are emerging from Charter jurisprudence as well as legal scholarship [Lessard, 1991]) will require a new understanding of judgement, and vice versa.

Communication: To academics, by continuing my active participation in conferences and workshops, publication in journals, and a book. To non-academics, by presentations such as those I have made to the Justice Department, Treasury Board, Canadian Bar Association, Ontario, Centre for Advanced Management (senior civil servants